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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,)	No. CR-08-190 JSW
v.)	DEFENDANT CASTILLO-CHUN'S
EFRAIN CASTILLO-CHUN,)	MOTION AND MEMORANDUM OF
Defendant.)	POINTS AND AUTHORITIES IN
)	SUPPORT OF MOTION TO DISMISS
)	INDICTMENT ON GROUNDS THAT
)	PRIOR DEPORTATION CANNOT
)	SERVE AS PREDICATE FOR ILLEGAL
)	REENTRY PROSECUTION
		Hearing Date: July 2, 2008
		Time: 10:00 am
		Court: Hon. Jeffrey S. White

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MISCELLANEOUS

¹² Wible, Brent S., *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After St. Cyr*, 19 GEO. IMMIGR. L.J. 455, 475 (Summer 2005). ¹³

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19 TO: UNITED STATES OF AMERICA, PLAINTIFF; AND JOSEPH RUSSONIELLO,
 20 UNITED STATES ATTORNEY, NORTHERN DISTRICT OF CALIFORNIA; AND
 DEREK OWENS, ASSISTANT UNITED STATES ATTORNEY:

21 PLEASE TAKE NOTICE that on July 2, 2008, at 10:00 a.m., before the Honorable
 22 Jeffrey S. White, defendant Efrain Castillo-Chun (hereinafter "Mr. Castillo-Chun") will move
 23 this Court to dismiss the indictment on the grounds that the prior deportation order was entered
 24 after constitutionally defective deportation proceedings and therefore cannot serve as a predicate
 25 for a prosecution under 8 U.S.C. § 1326.

26

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Efrain Castillo-Chun is charged in a one count indictment with a violation of 8
4 U.S.C. § 1326, illegal reentry after deportation. The indictment against Mr. Castillo-Chun
5 should be dismissed on the grounds that his deportation in 1996, as a matter of law, cannot
6 constitute the prior lawful deportation order necessary for the government to establish the
7 deportation element of a violation of 8 U.S.C. § 1326.

8 At the time of the deportation proceedings in 1996, Mr. Castillo-Chun had already been
9 granted asylum and withholding of removal after an immigration judge recently determined that
10 he had a legitimate fear of returning to Guatemala because there was a “clear probability” that he
11 would be persecuted if returned. While knowing this, the Immigration Judge (hereinafter “IJ”) –
12 contrary to clear authority – sent Mr. Castillo-Chun back to the very country that he feared.

13 The IJ did not ask about his fear of return to Guatemala, nor did he make any of the
14 necessary inquiries into whether he could lawfully be returned to Guatemala; instead, he overtly
15 mis-advised Mr. Castillo-Chun that he had no possibility of relief from deportation and ordered
16 him removed. Mr. Castillo-Chun should not have been returned to Guatemala after having
17 already established his fear of return. Through this error, the IJ denied Mr. Castillo-Chun due
18 process of law, resulting in the defendant’s unconstitutional deportation. There is no question
19 that Mr. Castillo-Chun suffered prejudice from this error because he was in fact eligible for relief
20 from deportation and was nonetheless ordered removed from the United States. Under these
21 circumstances, the underlying deportation order cannot serve as a predicate for a prosecution for
22 illegal reentry. As the aforementioned deportation was Mr. Castillo-Chun’s sole deportation or
23 removal from the United States, this case presents an unusual situation requiring that the
24 indictment be dismissed.

25 ///

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II. STATEMENT OF FACTS

A. Mr. Castillo-Chun's Background

3 Mr. Castillo-Chun was born on July 14, 1975 in Guatemala City, Guatemala, as one of
4 eight children. See Request for Asylum in the United States, attached to Linker Auth. Decl. as
5 Exhibit A. His father died when he was only four years old and his mother was left to care for
6 the entire family, all of whom lived in one room. *Id.* As a result of his family's extreme poverty,
7 Mr. Castillo-Chun spent much of his adolescence living in the streets. *Id.* While he was not a
8 street child, he certainly looked like one. While in Guatemala, he only attended school for a total
9 of five years, from age 7 to age 11, and then again at age 14. *Id.* At age 14, he had only
10 completed the fourth grade. *Id.* When he was just 11 years old, he had to leave school to work
11 because his mother had a stroke that paralyzed the right side of her body. *Id.* He worked for a
12 few years to help support the family, but was finally able to go back to school at age 14. *Id.*

13 A short time later, at the age of 15, Mr. Castillo-Chun fled to seek refuge in the United
14 States based on his fear of persecution in Guatemala. He arrived in the United States in March of
15 1991, and on August 5, 1991, at the age of 16, Mr. Castillo-Chun applied for asylum and
16 withholding of removal based on his fear of returning to Guatemala. *Id.* At the time of his
17 asylum application, he was living in a group home in Pittsburg, California called Amir Two.

18 As documented in greater detail in his asylum application, Mr. Castillo-Chun had several
19 grounds for fearing return to Guatemala. *Id.* During his time in Guatemala, he was involved in
20 political demonstrations, and feared the government would take retributive action against him for
21 those actions. *Id.* He was also abused by the police on several occasions. *Id.* He was beaten
22 and kicked by the police and despite reports to authorities, he was never provided any relief. *Id.*
23 Many of the children he was associating with were “disappeared” and then later found dead. *Id.*
24 He also lived in fear of being abducted and sent into the army. *Id.* He saw many people he knew
25 be taken and forced into the military. *Id.*

26 A hearing on Mr. Castillo-Chun's asylum application was held on October 17, 1991, at

1 which time the immigration judge concluded that his fear of returning to Guatemala was
2 legitimate. To so conclude, the immigration judge had to determine that Mr. Castillo-Chun had a
3 “well-founded fear” of persecution on account of race, religion, nationality, membership in a
4 social group, or political opinion, and therefore granted Mr. Castillo-Chun asylum under Section
5 208(a) of the Immigration and Naturalization Act (hereinafter “INA”). 8 U.S.C. § 1158 (1991).
6 In addition, the immigration judge also concluded that Mr. Castillo-Chun was entitled to a
7 separate and distinct form of relief entitled withholding of deportation under section 243(h) of
8 the INA, which precluded returning an alien to a country where he would face persecution and
9 required a higher standard of proof. *See* Memorandum of Oral Decision dated October 17, 1991,
10 attached to Linker Auth. Decl. as Exhibit B; *see also* 8 U.S.C. § 1253 (1991). By establishing
11 that there was a “clear probability” that he would face persecution if returned to Guatemala, Mr.
12 Castillo-Chun was also granted withholding of removal. *Id.*

13 The government was prohibited from returning Mr. Castillo-Chun to Guatemala having
14 granted him withholding of removal and he was therefore permitted to remain in the United
15 States. Having no family in Northern California, he continued to reside at the group home. After
16 experiencing little socialization, supervision and support in Guatemala, and experiencing
17 similarly deficient support in the group home, Mr. Castillo-Chun found it somewhat difficult to
18 adapt to life in the United States. He knew very little English and had a hard time keeping-up
19 with life in California. Mr. Castillo-Chun was enrolled in high school, even though he had only
20 completed the fourth grade in Guatemala. On March 8, 1994, while in his second year in high
21 school and just 18 years of age, he made a mistake that he has regretted his entire adult life. He
22 was accused and eventually convicted of sexually assaulting a fellow student who was 16 years
23 of age, pursuant to California Penal Code Section 289(a) (1994), rape by a foreign object. Mr.
24 Castillo-Chun was sentenced to the lowest term of confinement, three years (the highest term
25 being eight years). Because of his young age, at the discretion of the sentencing judge, he was
26 committed to the California Youth Authority (hereinafter “CYA”), rather than a state prison. *See*

1 Abstract of Judgement dated July 14, 1994 & Notice from California Department of Youth
 2 Authority dated March 21, 1996., attached to Linker Auth. Decl. as Exhibit C. Upon his release
 3 from custody, Mr. Castillo-Chun was placed in immigration proceedings.

4 **B. Mr. Castillo-Chun's Removal From the United States**

5 On March 7, 1996, the then Immigration and Naturalization Service (hereinafter "INS")
 6 (now "ICE") issued an Order to Show Cause and Notice of Hearing (hereinafter "OSC") for Mr.
 7 Castillo-Chun. *See* Order to Show Cause and Notice of Hearing dated March 7, 1996, attached
 8 to Linker Auth. Decl. as Exhibit D. The OSC alleged that Mr. Castillo-Chun was not a citizen of
 9 the United States, was a citizen of Guatemala, and had entered the country in 1991 without
 10 inspection. *Id.* It also alleged that he had been granted political asylum.¹ *Id.* It further alleged
 11 that he had been convicted on July 14, 1994 for violating California Penal Code Section 289(a),
 12 rape by a foreign object, and that he was sentenced to three years confinement for that offense.
 13 *Id.* The OSC charged that based on that information he was subject to deportation pursuant to
 14 Section 241(a)(2)(A)(i) of the Immigration and Nationality Act because he had been convicted of
 15 a crime involving moral turpitude committed within five years of entry and sentenced to
 16 confinement for one year or longer. *Id.*

17 On March 21, 1996, an immigration judge ordered that Mr. Castillo-Chun could be
 18 released on bond pending the determination of his immigration proceeding. *See* Notification to
 19 Alien of Conditions of Release or Detention dated March 21, 1996, attached to Linker Auth.
 20 Decl. as Exhibit E. On that same date, an immigration official indicated that his conviction was
 21 an aggravated felony. *See* Los Angeles District Office Deportation Officer Action Worksheet
 22 dated March 21, 1996, attached to Linker Auth. Decl. as Exhibit F. This was incorrect as a
 23 matter of law since Mr. Castillo-Chun's conviction did not fall under the then-definition of
 24 aggravated felony.

25
 26 ¹The OSC incorrectly states that he was granted political asylum on February 1, 1993. He
 was actually granted asylum and withholding of removal on October 17, 1991.

1 On April 26, 1996, Mr. Castillo-Chun was placed in removal proceedings before an
2 immigration judge. *See* Transcription of Immigration Hearing, attached to Linker Auth. Decl. as
3 Exhibit H. He was not represented by counsel. At the hearing, the IJ erroneously informed Mr.
4 Castillo-Chun that he was not entitled to “any relief.” *Id.* Mr. Castillo-Chun, not understanding
5 this, asked the IJ to explain it to him. *Id.* The IJ again erroneously responded, “Relief to avoid
6 the deportation, under the laws of the United States based on the conviction that you have there is
7 nothing that would uh, prevent an order of deportation entered against you.” *Id.* The IJ then
8 found Mr. Castillo-Chun removable and ordered him removed to Guatemala. *Id.*

9 At no time did any immigration official, including the IJ, discuss or inquire about Mr.
10 Castillo-Chun’s legitimate fear of returning to Guatemala. Nor did anyone discuss anything
11 about asylum or withholding of removal in general. Indeed, as Mr. Castillo-Chun attests, no
12 official ever informed him that he was eligible for any relief from deportation. *See* Castillo-Chun
13 Declaration, attached to Linker Auth Decl. as Exhibit G. Instead, he was only told what the IJ
14 informed him on the record: that he was not eligible for *any* form of relief. Relying on the IJ’s
15 statement, he believed there was nothing he could do to avoid his deportation; therefore, he
16 waived his appeal and was deported to Guatemala. *Id.*

17 **C. Legal Flaws in the Removal Proceeding**

18 Mr. Castillo-Chun was eligible for relief from deportation. Specifically, based on his
19 legitimate fear of return to Guatemala, he was entitled to continued status as an asylee and to
20 withholding of removal – two separate and distinct forms of relief. Every alien has a protected
21 interest, whether it is secured by statute or by the Constitution, to petition for asylum or
22 withholding of removal. *See Maldonado-Perez v. INS*, 865 F.2d 328, 332 (D.C. Cir. 1989). The
23 IJ failed to advise Mr. Castillo-Chun of his eligibility for asylum and withholding of removal,
24 despite being on notice that Mr. Castillo-Chun had recently been granted such relief. The IJ’s
25 failure rendered the deportation proceeding fundamentally unfair. Had the IJ properly advised
26 Mr. Castillo-Chun of his eligibility for relief, it was more than plausible that he would have been

1 granted relief and not deported back to Guatemala. Accordingly, he suffered prejudice as a result
 2 of the defect in his immigration proceeding.

3 At no point – before, during or after the immigration proceeding – was Mr. Castillo-Chun
 4 informed of his eligibility for any relief from deportation. To the contrary, he was affirmatively
 5 mis-advised that he was not eligible for any type of relief. Having been misadvised by the IJ of
 6 his eligibility for relief, Mr. Castillo-Chun did not knowingly and intelligently waive his right to
 7 appeal, and it was not a valid waiver of his appeal. As such, the deportation proceeding was
 8 clearly flawed.

9 III. ARGUMENT

10 **A. MR. CASTILLO-CHUN WAS DENIED DUE PROCESS AT HIS DEPORTATION
 11 HEARING BECAUSE THE IJ FAILED TO ADVISE HIM OF HIS ELIGIBILITY
 12 FOR DISCRETIONARY RELIEF, BY WHICH HE WAS SUBSTANTIALLY
 13 PREJUDICED, RESULTING IN A CONSTITUTIONALLY FLAWED
 14 DEPORTATION ORDER**

15 In general, in order to convict a defendant of violating 8 U.S.C. § 1326, illegal reentry
 16 after deportation, the government must prove the following three elements beyond a reasonable
 17 doubt: 1) the defendant is an alien; 2) the defendant was previously deported from the United
 18 States; and 3) the defendant was found in the United States without the consent of the Attorney
 19 General. 8 U.S.C. § 1326(a). As such, a defendant's prior deportation is a predicate element for
 20 a prosecution under 8 U.S.C. § 1326. The United States Supreme Court has long established,
 21 however, that a prior deportation order cannot serve as a predicate for a subsequent prosecution
 22 under 8 U.S.C. § 1326 when the deportation proceedings giving rise to the order were
 23 fundamentally flawed. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987).

24 The Supreme Court's holding is rooted in the Due Process Clause of the Constitution: if
 25 8 U.S.C. § 1326 "envisioned that a court may impose a criminal penalty for reentry after *any*
 26 deportation, regardless of how violative of the rights of the alien the deportation proceeding may
 have been, the statute does not comport with constitutional requirement of due process." *Id.* at
 838 (emphasis in original). Accordingly, the Court held that a defendant in a prosecution

1 pursuant to 8 U.S.C. § 1326 must be permitted to challenge the lawfulness of the prior
 2 deportation. *Id.*

3 In *Mendoza-Lopez*, the defendants were arrested and deported after a group hearing at
 4 which they purportedly waived their rights to apply for suspension of deportation and to appeal.
 5 *Id.* at 840. They returned to this country, were once again arrested, and the government charged
 6 them with a violation of 8 U.S.C. § 1326. *Id.* at 831. The underlying court found, and the
 7 Supreme Court accepted as true, that the Immigration Judge failed to adequately explain the
 8 defendants' right to suspension of deportation or their right to appeal. *Id.* at 840. The Supreme
 9 Court then held that because the Immigration Judge "permitted waivers of the right to appeal that
 10 were not the result of considered judgments by [defendants], and failed to advise [defendants]
 11 properly of their eligibility to apply for suspension of deportation . . . the violation of
 12 [defendants'] rights . . . amounted to a complete deprivation of judicial review." *Id.* at 841.
 13 Thus, the government would not be permitted to rely on that prior deportation order as reliable
 14 proof of an element of the § 1326 prosecution "[b]ecause [defendants] were deprived of their
 15 rights to appeal and of any basis to appeal since the only relief for which they would have been
 16 eligible was not adequately explained to them . . ." *Id.* at 841, 843. The dismissal of the
 17 indictments against defendants was required. *Id.* at 843.

18 In response to the holding of *Mendoza-Lopez*, Congress amended 8 U.S.C. § 1326 to
 19 explicitly provide for a three part test for when a defendant can collaterally challenge a prior
 20 deportation in a prosecution under section 1326:

21 In a criminal proceeding under this section, an alien may not challenge the validity
 22 of the deportation order described in subsection (a)(1) of this section or subsection (b) of
 this section unless the alien demonstrates that--

- 23 (1) the alien exhausted any administrative remedies that may have been available
 to seek relief against the order;
- 24 (2) the deportation proceedings at which the order was issued improperly deprived
 the alien of the opportunity for judicial review; and
- 25 (3) the entry of the order was fundamentally unfair.

1 8 U.S.C. § 1326(d). To prevail on a collateral attack to a prior deportation on grounds that the
 2 deportation proceedings were fundamentally flawed, the defendant must meet each prong of the
 3 three-part test. *See United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (citing
 4 8 U.S.C. § 1326(d)).

5 If a defendant succeeds in this three part test to collaterally attack the predicate
 6 deportation order, the indictment against him must be dismissed. *See United States v. Lopez-*
 7 *Menera*, 542 F.Supp.2d 1025, 1027 (N.D. Cal. 2008); *United States v. Lopez-Hernandez*, 2007
 8 WL 608111 (N.D.Cal. 2007); *United States v. Andrade-Partida*, 110 F.Supp.2d 1260, 1272
 9 (N.D. Cal. 2000).

10 **1. ENTRY OF THE DEPORTATION ORDER AGAINST MR. CASTILLO-**
 CHUN WAS FUNDAMENTALLY UNFAIR (8 U.S.C. § 1326(D)(1))

11 Here, Mr. Castillo-Chun's collateral challenge to his 1996 deportation order meets each
 12 prong of this three-part test. Because the first and second prongs are informed by the third, the
 13 below analysis begins with the third prong, *i.e.*, that the entry of the order was fundamentally
 14 unfair. "An underlying removal order is 'fundamentally unfair' if (1) an alien's 'due process
 15 rights were violated by defects in the underlying deportation proceeding' and (2) 'he suffered
 16 prejudice as a result of the defects.'" *Id.* (citing *United States v. Garcia-Martinez*, 228 F.3d 956,
 17 960 (9th Cir. 2000)). As detailed below, Mr. Castillo-Chun's due process rights were violated by
 18 defects at his 1996 deportation proceeding and he suffered prejudice as a result of those defects.
 19

20 **a. Mr. Castillo-Chun's Due Process Rights Were Violated by the Defects in**
 the Underlying Deportation Proceeding Because He Was Eligible for
 Asylum and Withholding of Removal

21 During a deportation hearing, the requirement that the IJ inform an alien of any apparent
 22 eligibility for relief from deportation and give the alien the opportunity to pursue that form of
 23 relief is "mandatory." *See United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (quoting
 24 *United States v. Arce-Hernandez*, 163 F.3d 559, 565 (9th Cir. 1998)). An erroneous
 25 determination by an IJ that the alien is statutorily ineligible for relief from deportation also
 26

1 constitutes a denial of due process. *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049-
 2 50 (9th Cir. 2004) (an inaccurate statement that an alien is ineligible for any relief constitutes a
 3 breach of the IJ's duty and a violation of due process). Failure of the IJ to inform the defendant
 4 of his eligibility for a waiver of deportation in the underlying proceedings establishes a violation
 5 of due process in a collateral appeal in a case brought under 8 U.S.C. § 1326. *See Arrieta*, 224
 6 F.3d at 1079. The failure of the IJ to advise an alien of his eligibility for a waiver of deportation
 7 violates the alien's due process rights and "amount[s] to a complete deprivation of judicial
 8 review of the determination." *Mendoza-Lopez*, at 840. "Even if the alien's eligibility is not
 9 clearly disclosed in the record, the IJ has a duty to discuss discretionary relief with the alien so
 10 long as the record as a whole raises a reasonable possibility of eligibility of such relief."
 11 *Andrade-Partida*, 110 F.Supp.2d at 1268.

12 i. **The IJ Failed To Advise Mr. Castillo-Chun That He Was
 13 Eligible for Asylum and Withholding of Removal**

14 Mr. Castillo-Chun's due process rights were clearly violated through the deportation
 15 process by the IJ's failure to advise him of his eligibility for relief. Based on the documents in
 16 the record before the IJ – as an asylee who had recently been determined to have a well-founded
 17 fear of return to Guatemala – the record as a whole raised a reasonable possibility of Mr.
 18 Castillo-Chun's eligibility for asylum and withholding of removal. Indeed, the IJ twice stated on
 19 the record that Mr. Castillo-Chun had previously been granted asylum and the prior order
 20 granting asylum and withholding was in Mr. Castillo-Chun's alien and nationality file ("A-File").
 21 Given that he had already been granted asylum, the IJ had a duty to discuss with Mr. Castillo-
 22 Chun his eligibility for asylum and withholding of removal. The IJ's failure to do so violated
 23 Mr. Castillo-Chun's due process rights. Furthermore, not only did the IJ fail to advise Mr.
 24 Castillo-Chun of eligibility for relief, he overtly *mis-advised* Mr. Castillo-Chun that he was not
 25 eligible for any relief when he was, in fact, so eligible. The IJ erroneously advised Mr. Castillo-
 26 Chun that "based on the conviction that you have there is nothing that would uh, prevent an

1 order of deportation entered against you," which was untrue given the fact that Mr. Castillo-Chun
 2 had *not* been convicted of an aggravated felony. This mis-advice further violated Mr. Castillo-
 3 Chun's due process rights.

4 On October 17, 1991, Mr. Castillo-Chun was granted asylum and withholding of removal
 5 based on an immigration judge's determination that there was a clear probability that he would
 6 be persecuted if he were returned to Guatemala. *See Memorandum of Oral Decision*, attached to
 7 Linker Auth. Decl. as Exhibit B. At his deportation proceeding in 1996, Mr. Castillo-Chun still
 8 met the standard for asylum and withholding of removal. Indeed, nothing had changed regarding
 9 his legitimate fear of returning to Guatemala. The only factor that had changed in that interim
 10 period was that Mr. Castillo-Chun had been convicted of a crime of moral turpitude within five
 11 years of his entry into the United States, therefore making him subject to deportation
 12 proceedings. Because his criminal conviction was *not* an aggravated felony, he was still eligible
 13 for asylum and withholding of removal. *See* 8 U.S.C. § 1158(a) & (d) (1996); 8 U.S.C. §
 14 1253(h) (1997).

15 At the time of Mr. Castillo-Chun's deportation proceeding on April 26, 1996, the law
 16 regarding asylum provided that an alien could be granted asylum if the Attorney General
 17 determined that the alien was a "refugee." *See* 8 U.S.C. § 1158(a). A refugee was defined as a
 18 person who was "unable or unwilling to return to" his or her home country "because of
 19 persecution or a well-founded fear of persecution on account of race, religion, nationality,
 20 membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A)
 21 (1996); *see Melkonian v. Ashcroft*, 320 F.3d 1061, 1064 (9th Cir. 2003). In addition to other
 22 exceptions not relevant here, only those who had been convicted of an aggravated felony were
 23 precluded from applying for asylum. 8 U.S.C. § 1158(d) (1996).

24 While asylum and withholding of removal are separate and distinct forms of relief, an
 25 application for asylum under 8 U.S.C. § 1158 is generally considered an application for
 26 withholding of removal as well. *See* 8 C.F.R. 208.3(b); *Ghadessi v. INS*, 797 F.2d 804, n.1 (9th

1 Cir. 1986). Withholding codified the international norm of “nonrefoulement” or non-return to a
 2 country where an applicant would face persecution. *See Sale v. Haitian Centers Council, Inc.*,
 3 509 U.S. 155, 179 (1993); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1998) (en banc). At the time
 4 of Mr. Castillo-Chun’s deportation proceeding in 1996, in order to qualify for withholding of
 5 removal, an applicant had to show that his or her “life or freedom would be threatened” if
 6 returned to his or her homeland, on account of race, religion, nationality, membership in a
 7 particular social group, or political opinion. *See 8 U.S.C. § 1253(h)* (1997). To qualify for
 8 withholding of removal, “an alien must demonstrate that it is more likely than not that he would
 9 be subject to persecution on one of the specified grounds.” *Al-Harbi v. INS*, 242 F.3d 882, 888
 10 (9th Cir. 2001) (internal quotations and citations omitted). “Unlike asylum, withholding of
 11 removal is not discretionary. The Attorney General is not permitted to deport an alien to a
 12 country where his life or freedom would be threatened on account of one of the same protected
 13 grounds that apply under the asylum statute.” *Id.* (internal quotations and citations omitted).

14 At his 1996 deportation proceeding, the IJ knew that Mr. Castillo-Chun had already been
 15 granted asylum based on his legitimate fear of returning to Guatemala. Twice, the IJ recognized
 16 this fact on the record. *See* Transcription of Immigration Hearing, attached to Linker Auth. Decl.
 17 as Exhibit H. Accordingly, there is no question that he was on notice of Mr. Castillo-Chun’s
 18 legitimate fear of return to his home country. At a minimum, he should have inquired about Mr.
 19 Castillo-Chun’s continued fear of return to Guatemala. *See* Declaration of Angela Bean, Esq.,
 20 (hereinafter “Bean Decl.”) attached to Linker Auth. Decl. as Exhibit J. Had he done so, Mr.
 21 Castillo-Chun would have informed him that he was, indeed, still in fear of returning to
 22 Guatemala. *See* Castillo-Chun Declaration, attached to Linker Auth Decl. as Exhibit G.

23 There was absolutely nothing in the record to suggest that his fear of return to Guatemala
 24 had changed. As such, the IJ was *required* to advise Mr. Castillo-Chun of his right to seek relief
 25 from deportation and avoid deportation back to the very country from which he had been granted
 26 asylum and withholding of removal. *See Orantes-Hernandez v. Smith*, 451 F. Supp. 351, 355-58

1 (C.D. Cal 1982). The IJ completely failed to inform Mr. Castillo-Chun of his eligibility for
2 either form of relief (asylum or withholding of removal), and instead, affirmatively informed Mr.
3 Castillo-Chun that there was “nothing that would prevent” his deportation. *See* Bean Decl.,
4 attached to Linker Auth. Decl. as Exhibit J. The contrary was true. Mr. Castillo-Chun was not
5 only eligible for asylum and withholding of removal, it was more than probable that he would
6 have been granted such relief if the IJ had advised him correctly. *Id.*

ii. Mr. Castillo-Chun Was Also Eligible for Relief Under the UN Protocol

At the time of Mr. Castillo-Chun’s deportation proceeding, the standard for withholding of removal under 8 U.S.C. § 1253(h) recently had been expanded as part of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”).² Under the expanded withholding provision, those whose life or freedom would be threatened in their home country were eligible for withholding of removal *regardless of the exceptions provided in 8 U.S.C. § 1253(h)(2)* if such withholding was necessary to “ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.” 8 U.S.C § 1253(h)(3) (1997); *see Miguel-Miguel v. Gonzalez*, 500 F. 3d 941, 946 (9th Cir. 2007).

As such, Mr. Castillo-Chun was also eligible for relief under the UN Protocol; yet, as with asylum and withholding of removal, the IJ failed to advise him accordingly. While the IJ's failure to notify Mr. Castillo-Chun of his eligibility for relief under the UN Protocol may have been understandable due to the recency of the law's amendment (the expanded provision regarding the UN Protocol had gone into effect only two days prior to his immigration hearing), the IJ nonetheless had a duty to advise Mr. Castillo-Chun of all discretionary relief to which he

²The timing of Mr. Castillo-Chun’s deportation proceeding (April 26, 1996) raises unique issues because it occurred two days after the AEDPA was enacted (April 24, 1996), but before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter “IIRIRA”) was enacted (September 26, 1996). Pursuant to the explicit terms of AEDPA and the U.S. Supreme Court’s ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001), certain provisions of the new law applied to Mr. Castillo-Chun, while others did not.

1 was reasonably entitled. *See Andrade-Partida*, 110 F.Supp.2d at 1268. The IJ's failure to do so
 2 further violated Mr. Castillo-Chun's due process rights.

3 **b. *Mr. Castillo-Chun Suffered Prejudice As a Result of These Defects***

4 To satisfy a showing of prejudice, an "alien does not have to show that he actually would
 5 have been granted relief. Instead, he must only show that he had a 'plausible' ground for relief
 6 from deportation." *See Ubaldo-Figueroa*, 364 F.3d at 1050 (quoting *United States v. Arrieta*,
 7 224 F.3d 1076, 1079 (9th Cir. 2000)). Although the Ninth Circuit has not defined the term
 8 "plausible," "this standard would seem to encompass borderline cases, perhaps even where the
 9 equities are in equipoise. Stated differently, it seems fair to interpret this standard as granting
 10 defendants in illegal entry cases the benefit of the doubt, even if they have a borderline claim of
 11 prejudice, as long as they establish that their deportation proceeding was procedurally deficient."
 12 Wible, Brent S., *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on*
 13 *Deportation Orders in Prosecutions for Illegal Reentry After St. Cyr*, 19 GEO. IMMIGR. L.J. 455,
 14 475 (Summer 2005). Thus, under applicable law, Mr. Castillo-Chun **need not** show that he
 15 actually would have been granted relief, or even that there was a reasonable probability that he
 16 would have been granted relief. *See United States v. Muro-Inclan*, 249 F.3d 1180, 1184 (9th Cir.
 17 2001). A showing of plausible or possible granting of relief is sufficient.

18 Here, there is no question that Mr. Castillo-Chun was prejudiced by the defects in his
 19 deportation proceeding: had the defects not occurred, he would not have been returned to
 20 Guatemala, the very country that the INS had recently determined he had a well-founded fear of
 21 return. The INS had already determined that there was a "clear probability" that he would be
 22 persecuted if returned to Guatemala, yet, while knowing of Mr. Castillo-Chun's asylee status –
 23 and without a single question or finding regarding his fear of return – the IJ sent him back to
 24 Guatemala. Such a fundamental flaw cannot stand.

25 At the time of his 1996 deportation proceeding, the standard for asylum and withholding
 26 of removal had not changed since his original grant of such relief in 1991; therefore, if properly

1 advised, he would have sought and been granted relief. Asylum still applied to “any person who
 2 is outside any country of such person’s nationality . . . and who is unable or unwilling to return
 3 to, and is unable or unwilling to avail himself or herself of the protection of, that country because
 4 of persecution or a well-founded fear of persecution on account of race, religion, nationality,
 5 membership in a particular social group, or political opinion,” just as it did in 1991. *Compare* 8
 6 U.S.C. § 1158 (1996) & 8 U.S.C. 1101(a)(43)(A) (1996) *with* 8 U.S.C. § 1158 (1991) (an “alien
 7 may be granted asylum in the discretion of the Attorney General if the Attorney General
 8 determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this
 9 title.”) & 8 U.S.C. § 1101 (1991) (“The term “refugee” means (A) any person who is outside any
 10 country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable
 11 or unwilling to avail himself or herself of the protection of, that country because of persecution
 12 or a well-founded fear of persecution on account of race, religion, nationality, membership in a
 13 particular social group, or political opinion.”).

14 In addition, the standard for withholding of removal had not changed between the time of
 15 his 1991 granting of withholding and his 1996 deportation proceeding. At his deportation
 16 hearing on April 26, 1996, the standard for withholding of removal was still as follows: “The
 17 Attorney General *shall not* deport or return any alien (other than an alien described in section
 18 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien’s life
 19 or freedom would be threatened in such country on account of race, religion, nationality,
 20 membership in a particular social group, or political opinion.” 8 U.S.C. § 1253(h)(1) (1997)
 21 (*emphasis added*); *compare* 8 U.S.C. § 1253(h)(1) (1991) (“The Attorney General shall not
 22 deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a
 23 country if the Attorney General determines that such alien’s life or freedom would be threatened
 24 in such country on account of race, religion, nationality, membership in a particular social group,
 25 or political opinion.”).

26 Accordingly, there is no question that Mr. Castillo-Chun still met the standard for asylum

1 and withholding of removal *because the standard had not changed* since he had recently been
 2 granted such relief. The IJ's complete failure to advise him of his eligibility for this relief,
 3 therefore prejudiced him. Had he been properly advised, he would have sought such relief, and it
 4 is, at a minimum, probable that he would have been granted such relief. Indeed, the defect in Mr.
 5 Castillo-Chun's deportation proceeding resulted in the precise situation that the asylum and
 6 withholding statutes sought to avoid: he was sent back to the very country that the feared return.

7 The government may try to argue that Mr. Castillo-Chun would not have been granted
 8 either form of relief because of his prior conviction.. Such an argument is utterly baseless. At
 9 the time of Mr. Castillo-Chun's conviction and also at the time of his deportation proceeding,
 10 Mr. Castillo-Chun's prior conviction was *not* an aggravated felony; therefore, his prior
 11 conviction did not render him ineligible for relief from deportation. *See* Bean Decl., attached to
 12 Linker Auth. Decl. as Exhibit J; *see also INS v. St. Cyr*, 533 U.S. 289 (2001) (regarding
 13 retroactivity of amendments to immigration laws) and *Kankamalage v. INS*, 335 F.3d 858, 863-
 14 64 (9th Cir. 2003) (same).

15 Under 8 U.S.C. § 1158(d), only those "convicted of an aggravated felon . . . may not
 16 apply for or be granted asylum." 8 U.S.C § 1158(d) (1996). Moreover, under section
 17 1253(h)(2), an alien was ineligible for withholding of removal if the Attorney General
 18 determined the alien "having been convicted by a final judgment of a particularly serious crime,
 19 constitutes a danger to the community of the United States." 8 U.S.C. § 1253(h)(2)(B) (1997).
 20 Congress was not silent about what constituted a "particularly serious crime" at that time.
 21 Indeed, Congress explicitly provided that "an alien who has an aggravated felony shall be
 22 considered to have committed a particularly serious crime." Because Mr. Castillo-Chun's
 23 conviction was not an aggravated felony, it was likely that he would have been granted relief
 24 from deportation. *See* Bean Decl., attached to Linker Auth. Decl. as Exhibit J.

25 To be considered an aggravated felony, the IJ would have had to have determined that his
 26 prior conviction was a crime of violence for which the term of imprisonment was *at least five*

1 years. 8 U.S.C. Section 1101(a)(43) (1996) (“The term ‘aggravated felony’ means – . . . (F) a
2 crime of violence . . . for which the term of imprisonment (regardless of any suspension of
3 imprisonment) is at least five years.”).³ As Mr. Castillo-Chun was only sentenced to three years
4 imprisonment, his conviction was not an aggravated felony and therefore was eligible for both
5 asylum and withholding of removal. See *Kankamalage*, 335 F. 3d at 864 (“Under the
6 immigration laws in effect at that time, his conviction was not an aggravated felony because the
7 sentence imposed was less than five years.”) (citing *United States v. Velasco-Medina*, 305 F.3d
8 839 (9th Cir. 2002)).

Indeed, in *Afridi v. Gonzalez*, the Ninth Circuit concluded that the immigration judge could not generalize that a certain type of crime categorically excluded an alien for eligibility for relief, but instead had to examine the underlying facts and circumstances of the conviction. 442 F. 3d 1212, 1220 (9th Cir. 2006). There, Mr. Afridi had been convicted of an offense that the court determined was sexual abuse of a minor, an aggravated felony under the law that applied to him.⁴ *Id.* at 1215. The Ninth Circuit concluded that even though crimes involving sexual abuse of a minor generally involve force, that is not sufficient to determine that one is ineligible for relief. *Id.* at 1219. Rather, it is still plausible that one convicted of such an offense may not be a danger to the community. The Ninth Circuit held that the immigration court “leapt directly from

³AEDPA amended the definition of “aggravated felony” under 8 U.S.C. § 1101(a)(43).
19 Pub. L. 104-132, Title IV § 440(e), April 24, 1996. That amendment, however, did not apply to
20 the type of felony for which Mr. Castillo-Chun was convicted. *Id.* Moreover, the amendments to
Section 1101 only applied to “convictions entered on or after” April 24, 1996. *Id.* at § 440(f).
21 As Mr. Castillo-Chun’s date of conviction was July 14, 1994 – well before April 24, 1996 –
AEDPA’s amendments to the definition of aggravated felony do not apply. Similarly, the
22 amendments to the definition of aggravated felony contained in IIRIRA do not apply to Mr.
Castillo-Chun, as that act was enacted on September 30, 1996 and went into effect on April 1,
23 1997 – long after Mr. Castillo-Chun’s conviction and deportation proceeding. See *Kankamalage*,
335 F. 3d at 864.

⁴ At the time of Mr. Alfridi's deportation proceeding, the law regarding withholding of removal had been amended such that it did not exclude from eligibility all aliens convicted of aggravated felonies, but only those who had committed aggravated felonies where the sentence imposed was at least five years. *Id.* at 1217.

1 the fact of conviction to the determination that it could not withhold deportation,” rather than
2 examining the particularized circumstances of the case. *Id.* Thus, where an offense does not
3 categorically exclude an applicant from withholding, the immigration judge *must* conduct a case
4 specific analysis and not simply rely on the type of conviction because – despite the type of
5 offense – the alien may not be found to be a danger to the community.

6 Here, Mr. Castillo-Chun was similarly denied the opportunity to establish his eligibility
7 for both asylum and withholding of removal. Had Mr. Castillo-Chun been given that
8 opportunity, the IJ would have learned that his conviction was not an aggravated felony.
9 Significantly, his offense was not even on the cusp of being considered an aggravated felony;
10 instead, his sentence was two years shy of what was considered an aggravated felony at the time.
11 The fact that he was sentenced to the lowest possible sentence for his offense further exemplifies
12 that the sentencing judge did not feel that Mr. Castillo-Chun was a danger to the community.
13 Additionally, the offense was committed when Mr. Castillo-Chun was just eighteen years old,
14 and in the tenth grade. Because of his youth, he was not sent to prison, but was instead sent to
15 the California Youth Authority to serve his sentence. Just as in *Afridi*, the type of conviction did
16 not categorically exclude Mr. Castillo-Chun from relief from deportation. To the contrary, Mr.
17 Castillo-Chun was eligible for relief, and given the particular circumstances of Mr. Castillo-
18 Chun’s offense and his personal situation, had Mr. Castillo-Chun been provided what he was
19 entitled – an individualized determination of his eligibility for asylum and withholding – it was
20 more than plausible that he would have been granted relief from deportation.

21 In sum, the failure of the IJ to advise Mr. Castillo-Chun of his eligibility for withholding
22 of removal resulted in Mr. Castillo-Chun’s immediate deportation. The IJ informed Mr. Castillo-
23 Chun that he was not eligible for *any* form of relief from deportation. That was plainly wrong.
24 Had it not been for the defect in Mr. Castillo-Chun’s deportation proceeding, he would not have
25 been deported back to the very country that the United States government had already determined
26 he legitimately feared. Accordingly, Mr. Castillo-Chun thus suffered substantial prejudice: he

1 was eligible for both asylum and withholding of removal and it is more than plausible that he
 2 would have received relief from deportation had he been properly advised.

3 **2. AS MR. CASTILLO-CHUN WAS MIS-ADVISED BY THE IJ, HIS
 4 WAIVER OF APPEAL WAS NOT KNOWING AND INTELLIGENT AND
 5 HE WAS DENIED THE OPPORTUNITY FOR JUDICIAL REVIEW (8
 6 U.S.C. § 1326(D)(1) AND (D)(2))**

7 **a. *Because Mr. Castillo-Chun's Waiver of Appeal was Not Knowing and
 8 Intelligent, He is Deemed to Have Exhausted his Administrative
 9 Remedies***

10 Although 8 U.S.C. § 1326(d)(1) requires that an alien exhaust all administrative remedies
 11 before a collateral attack will succeed, the exhaustion requirement “cannot bar collateral review
 12 of a deportation proceeding when the waiver of right to an administrative appeal did not comport
 13 with due process.” *Ubaldo-Figueroa*, 364 F.3d at 1048 (citing *United States v. Muro-Inclan*, 249
 14 F.3d 1180, 1183-84 (9th Cir. 2001)). The Due Process Clause requires that an alien’s waiver of
 15 his right to appeal a deportation order be “considered and intelligent.” *See id* at 1049; *see also*
 16 *Mendoza-Lopez*, 481 U.S. at 839. An alien who is not advised of his rights cannot make a
 17 “considered and intelligent” waiver, and is thus not subject to the exhaustion of administrative
 18 remedies requirement of 8 U.S.C. § 1326(d). *See Ubaldo-Figueroa*, 364 F.3d at 1049-1050;
 19 *Pallares*, 359 F.3d at 1096 (“Where ‘the record contains an inference that the petitioner is
 20 eligible for relief from deportation,’ but the IJ fails to ‘advise an alien of this possibility and give
 21 him an opportunity to develop the issue,’ we do not consider an alien’s waiver of his right to
 22 appeal his deportation order to be ‘considered and intelligent.’”)(citing *Muro-Inclan*, 249 F.3d at
 23 1182)(remaining citations omitted.) As such, under Ninth Circuit precedent, the undisputed
 24 failure of the IJ or any immigration official to correctly advise Mr. Castillo-Chun of his eligibility
 25 for asylum and withholding of removal – and the affirmative statement that Mr. Castillo-Chun
 26 was not eligible for *any* form of relief – excuses Mr. Castillo-Chun from the administrative
 remedies exhaustion requirement of his collateral attack under 8 U.S.C. § 1326(d)(1). *See Muro-*
Inclan, 249 F.3d at 1183; *Lopez-Menera*, 542 F.Supp.2d at 1027.

1 **b. Mr. Castillo-Chun was Also Deprived of An Opportunity for Judicial**
 2 **Review**

3 An immigration judge is obligated to advise an alien regarding apparent avenues for relief
 4 from deportation. *See, e.g., Duran v. INS*, 756 F.2d 1338, 1341-42 (9th Cir.1985) (citing 8
 5 C.F.R. § 242.17(a) (1984)). When the IJ fails to so advise, the Ninth Circuit has held that aliens
 6 are deprived a meaningful opportunity for judicial review. *See, e.g, Pallares-Galan*, 359 F.3d at
 7 1098 (“For the same reasons [as those stated to find that Pallares’ waiver of appeal was
 8 procedurally defective] we hold that Pallares was deprived of a meaningful opportunity for
 9 judicial review”); *see also Ubaldo-Figueroa*, 364 F.3d at 1050 (same); *see also Andrade-*
 10 *Partida*, 110 F. Supp at 1271 (finding that the IJ’s failure to advise of section 212(c) relief
 11 deprived the alien of judicial review). Mr. Castillo-Chun thus meets this prong of a collateral
 12 attack on his deportation proceeding.

13 **B. IN SUM, THE INDICTMENT MUST BE DISMISSED BASED ON THE**
 14 **FUNDAMENTAL FLAW IN THE APRIL 26, 1996 DEPORTATION HEARING**

15 An immigration judge has a duty to inform an alien of any relief to which he may be
 16 entitled. *See Arce-Hernandez*, 163 F.3d at 562. The Supreme Court has long recognized that
 17 because deportation “visits a great hardship on the individual and deprives him of the right to
 18 stay and live and work in this land of freedom[,] . . . [m]eticulous care must be exercised lest the
 19 procedure by which he is deprived of that liberty not meet the essential standards of fairness.”
 20 *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *see e.g., United States v. Ortiz-Lopez*, 385 F. 3d
 21 1202 (9th Cir. 2004) (holding that the IJ’s failure to advise an individual of eligibility for
 22 voluntary departure was violation of due process requiring remand to the district court, and
 23 placing the burden on the government to present evidence that procedural violation could not
 24 have changed the outcome of the proceedings). The high stakes of a removal proceeding and the
 25 maze of immigration rules and regulations make evident the necessity that the IJ carefully guide
 26 the unrepresented person in immigration proceedings. The proliferation of immigration laws and
 26 regulations has aptly been called a labyrinth that only a lawyer could navigate. *Castro-Ryan v.*

1 INS, 847 F.2d 1307, 1312 (9th Cir. 1988).

2 Here, because the IJ (1) failed to advise Mr. Castillo-Chun of his eligibility for asylum
 3 and withholding of removal, and (2) affirmatively *mis-advised* Mr. Castillo-Chun that he was not
 4 eligible for any form of relief, Mr. Castillo-Chun's due process rights were violated. Given that
 5 Mr. Castillo-Chun was eligible for both asylum and withholding of removal and has
 6 demonstrated that he was a plausible candidate for such relief, he was prejudiced by the IJ's
 7 erroneous advice. Accordingly, Mr. Castillo-Chun's deportation proceedings were
 8 fundamentally flawed. Under Ninth Circuit precedent, the aforementioned circumstances excuse
 9 Mr. Castillo-Chun from the administrative exhaustion requirement. Under the same reasoning,
 10 Mr. Castillo-Chun was denied the opportunity for judicial review. Thus, Mr. Castillo-Chun
 11 successfully meets all three prongs of a collateral attack on the April 26, 1996 deportation that is
 12 a necessary element for his conviction under 8 U.S.C. § 1326. Given that the April 26, 1996
 13 deportation is the only deportation Mr. Castillo-Chun has suffered, the United States cannot meet
 14 its burden of proof on an essential element of the charge under 8 U.S.C. § 1326. Accordingly,
 15 the indictment must be dismissed.

16 IV. CONCLUSION

17 For the foregoing reasons, Mr. Castillo-Chun respectfully requests that this Court dismiss
 18 the indictment in the instant case.

19 Dated: June 5, 2008

20 Respectfully submitted,

21 BARRY J. PORTMAN
 22 Federal Public Defender

23 /s/

24 JODI LINKER
 25 Assistant Federal Public Defender

26